Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification and	)	CC Docket No. 96-128
Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom ("ITC^DeltaCom"), by its attorneys, pursuant to 47 C.F.R. § 1.429(g), hereby replies to the Oppositions filed May 1, 2002, by AT&T Corp. ("AT&T"), the RBOC Payphone Coalition ("RBOC Coalition"), Sprint Corporation ("Sprint"), and WorldCom, Inc. ("WorldCom") (collectively, the "Opposing Parties"), to ITC^DeltaCom's Petition for Reconsideration ("*Petition*") of certain aspects of the Commission's *Fourth Order on Reconsideration*[1] in the above-captioned docket. As discussed in greater detail below, the opposing parties have misapplied the governing law to the issues raised in ITC^DeltaCom's *Petition*. Accordingly, those oppositions should be dismissed.

I. DISCUSSION

A. The Opposing Parties Have Failed to Recognize That the Law Governing Retroactivity Differs Depending on Whether the Rule is Promulgated Through an Adjudicatory Proceeding or Through the Rulemaking Process.

As administrative law experts have observed, until 1988, the law concerning the power of agencies to make rules with retroactive effect was the same whether the rule was made in the process of adjudicating a case or instead through the rulemaking process.[2] Indeed, before 1988,

---

1 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, CC Docket No. 96-128, FCC 02-22 (released Jan. 31, 2002) ("*Fourth Order on Reconsideration*").

2 *See* Richard J. Pierce, Jr., *Administrative Law Treatise*, § 6.7, p. 361 (4th ed. 2002).

retroactive effect could be given to a new agency rule so long as the resulting inequities were counterbalanced by legitimate purposes and sufficiently significant statutory and public interests. However, the law changed "drastically"[3] after the Supreme Court issued its unanimous decision in *Bowen v. Georgetown University Hospital.*[4] In *Bowen*, the Court announced a rule of statutory construction that effectively precludes agencies from using the rulemaking process to create rules with any retroactive effect. Under *Bowen*, an agency can create a new rule in a rulemaking proceeding and apply that rule retroactively only if Congress has granted such authority in express terms.[5] Thus, under current law, except in an adjudicative context, an agency cannot make a new rule and apply it retroactively.

However, the Opposing Parties' approach to ITC^DeltaCom's *Petition* is to mistakenly rely on retroactivity doctrine that is relevant only to agency adjudications.[6] First, Sprint initially attempts to limit the relevance of *Bowen's* retroactivity analysis by claiming that *Bowen* focused

---

3 *Id.*

4 *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468 (1988).

5 *Id.* at 208, 109 S.Ct. 472 ("[A] statutory grant of legislative rulemaking power will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 268, 114 S.Ct. 1483, 1498 (1994) ("[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 117 S.Ct. 1871, 1876 (Stating that this Court applies the "time-honored presumption [against retroactive legislation] unless Congress has clearly manifested its intent to the contrary."). (internal citations omitted).

6 ITC^DeltaCom notes that the American Public Communications Council ("APPC") in recent *ex parte* written communications acknowledges the legal limitations to retroactive rulemaking in this proceeding. *See* Letter of April 15, 2002 to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich re: Early Period (1992-1996) Compensation at 3 (noting that "APCC is not requesting the Commission to Order IXCs to pay additional compensation to compensate PSPs for the call that were uncompensated during the Early Period"); Letter of April 15, 2002 to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich re: Standards for granting Retroactive True Ups at 9 ("While service providers may not be entitled as a matter of *law* to recoup past losses in *prospective* rates, the question of *equity* posed by *retroactive* application of post-remand rates presents different considerations.") (emphasis in original).

on a "particular statutory scheme."[7] Sprint then attempts to improperly extend the Supreme Court's holdings in *Callery*[8] and *Chenery*[9] to claim that the Commission has discretion to retroactively impose on small interexchange carriers the duty to pay per-phone compensation for the first year of the interim period.[10]

At issue in *Callery* was a Federal Power Commission ("FPC") order resolving an adjudicatory dispute that imposed protective conditions on certificates for the sale of gas, and which required gas producers to refund to their customers the difference between amounts previously collected under judicially invalidated certificate orders and a price subsequently established by the FCP in a rate proceeding.[11] There, the Supreme Court concluded that the agency "had authority [in the context of an adjudicative proceeding] to issue a refund order despite the fact that it had no power to make reparation orders, . . . its power to fix rates . . . being prospective only."[12]

---

7 Sprint Opposition at 12..

8 *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 86 S.Ct. 360 (1965).

9 *SEC v. Chenery Corp.*, 332 U.S. 194 67 S.Ct. 1575 (1947).

10 Sprint Opposition at 12.

11 In *Callery*, the FPC had granted unconditioned certificates of public convenience and necessity to numerous gas producers for authority to sell gas at certain initial contract prices. After deliveries commenced, the rates were challenged in various courts of appeals. The cases were remanded to the FPC for reconsideration and re-determination. The FPC thereupon instituted an area rate proceeding, consolidated the remanded cases with the rate proceeding, and advised the producers of their potential obligation to refund any amounts eventually found to be inconsistent with the requirements of the public interest and necessity under certain provisions of the Natural Gas Act. At the end of the rate proceeding, the FPC imposed two conditions on the certificates. The FPC also ordered producers to refund to their customers the amounts in excess of the proper initial rate which had already been collected under the original contracts. On review, the Court of Appeals for the Fifth Circuit reversed and remanded the cases to the FPC for further proceedings. On review, the Supreme Court upheld the FPC's authority in the context of an adjudicative proceeding to impose, as a condition to the granting of a new certificate of public convenience and necessity required for the sale of nature gas, limitations on the maximum rates, and to issue refunds.

12 *Callery*, 382 U.S. at 229, 86 S.Ct. 364 (internal citations omitted).

The Court's holding in *Callery* to permit retroactive ratemaking in the context of an adjudicative proceeding is not at all inconsistent with its later decision in *Bowen* to disallow retroactive rulemaking in the context of a rulemaking proceeding. However, because the payphone compensation rule at issue here was created in a rulemaking proceeding, the holdings in *Callery* are inapposite. The law under *Bowen* controls.

Similarly, in *Chenery* the Supreme Court recognized that administrative agencies have the discretion to create a new rule in an opinion resolving an adjudicatory dispute and apply that rule retroactively to the parties before it.[13] As Justice Scalia explained in *Bowen* (which is equally relevant here), the Court's opinion in *Chenery* "has nothing to do with the issue before us here, since it involved adjudication rather than rulemaking."[14] Accordingly, because the payphone compensation rule at issue here was created in a rulemaking proceeding, *Chenery* is not applicable.

Second, the RBOC Coalition misrepresents the extent of court's holding in *Exxon*[15] by wrongly claiming that the cited legal proposition (*i.e.*, "put the parties in the position they would have been in had the error not been made") applies to legal error committed by an agency in a "legislative rulemaking capacity."[16] In fact, the cited legal proposition applies to legal error committed by an agency resulting from *adjudicatory actions*. The *Exxon* case involved an appellate court review of an agency decision to approve a portion of a contested settlement proposal that was reached in a proceeding conducted by an Administrative Law Judge. Indeed,

---

13 In *Chenery*, the SEC, acting pursuant to broad statutory to oversee the reorganization of public utility holding companies, issued an enforcement order that required the management of a company to give up its own stock in the company. There, the Supreme Court recognized that administrative agencies have the discretion to deal with problems on an ad hoc, case-by-case basis through adjudication. 332 U.S. at 203, 67 S.Ct. at 1580. Chenery thus upheld the retroactive clarification of uncertain law through adjudication.

14 *Bowen*, 488 U.S. 220, 109 S.Ct. 478 (Scalia, J., concurring).

15 *Exxon Co. v. FERC*, 182 F.3d 30 (1999).

even a casual reading of *Exxon* makes abundantly clear that its retroactivity analysis only applies to agency adjudications.[17] Accordingly, the retroactivity analysis in *Exxon* is not relevant to the instant matter.

B. The Imposition of an Interim Compensation Obligation on Small IXCs Would Impermissibly Alter the Legal Consequences of Past Actions.

Numerous Federal courts have also expressed concerns over impermissible retroactivity that are independent of *Bowen's* insistence on explicit statutory authority. For example, in *Landgraf*,[18] the Supreme Court considered when a statute should be found to have retroactive effect in the absence of specific legislative authorization (*i.e.*, where there is "clear congressional intent favoring such a result"). There, the Court held that in the absence of finding express statutory command, impermissible retroactivity occurs where the effects of the new rule "would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[19] As the Court later clarified, "any such effect constitute[s] a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity."[20] In other words, any one of these effects are sufficient to render a new rule impermissibly retroactive.

The effect of the Commission's initial order in this proceeding was to exclude small IXCs from any obligation to pay compensation during the first year of the interim period.[21] Relying

---

16 RBOC Coalition at 2.

17 *See, e.g., Exxon*, 182 F.2d at 47-49 (discussing retroactivity analysis in the context of agency settlement proceedings).

18 *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994).

19 *Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505 (1994); *see also Bergerco Canada v. U.S. Treasury Dept.*, 129 F.3d 189 (D.C. Cir. 1998).

20 *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 947, 117 S.Ct. 1871, 1876 (1997) (emphasis in original).

21 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20601 (¶119) (1996) ("*Report and Order*").

upon the Commission's determination that no compensation was owed, small IXCs focused on preparing for per-call compensation, which was scheduled to begin in October 1997. In particular, ITC^DeltaCom did not maintain the records necessary to verify the compensation for which it would bear responsibility under the *Fourth Order on Reconsideration*. Also in reliance on the Commission's prior ruling, ITC^DeltaCom did not recover the amounts necessary to pay per-payphone compensation from its customers, nor did it set aside funds for such payments.[22]

By now imposing a duty on all IXCs to pay compensation for the interim period, the rule adopted in the *Fourth Order on Reconsideration* would have a clear retroactive effect because it would "increase a party's liability for past conduct."[23] Specifically, the new rule would impose a new per-phone payment obligation on small IXCs years after the fact. The rule would increase ITC^DeltaCom's liability for its conduct during this period, albeit by an as yet undetermined amount. Apart from *Bowen's* categorical bar against unauthorized retroactivity, under *Landgraf*, the Commission cannot now impose a compensation obligation for the first year of the interim period without violating the prohibition on retroactive rulemaking.[24]

---

22 Given that the rule in effect at the time stated that no compensation would be owed, it defies logic that Sprint would even make the suggestion that ITC^DeltaCom or other small IXCs should have reserved for compensation obligations or attempted to recover these amounts from its customers. Sprint Opposition at 14. Sprint appears to expect that small IXCs would have surcharged their payphone customers based solely on the possibility that, some day, the rule might be revised.

23 *See Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505.

24 AT&T incorrectly claims (AT&T Opposition at 5) that the D.C. Circuit in the *Illinois* decision "squarely rejected" ITC^DeltaCom's point that retroactively imposing a duty to pay on small IXCs would be unduly burdensome and unfair. In fact, the issue before the D.C. Circuit was the lawfulness of the payphone compensation regime as initially adopted. At the time, there was no claim that the rules were being retroactively applied. While the court did address the Commission's basis for only requiring the large IXC's to pay compensation during the first year of the interim period (*i.e.*, the likely administrative burdens that would be imposed on the smaller IXCs), it did not pass on the issue of whether *retroactively* imposing on small IXCs a duty to pay per-payphone compensation would be permissible under the governing law. This is a critical distinction. It is abundantly clear that application of the Court's analysis in *Landgraf* would preclude such retroactive imposition.

C. ITC^DeltaCom and the Small IXCs Did Not Have Sufficient Notice to Establish Individual Compensable Call Tracking Mechanisms.

The RBOC Coalition and Sprint claim that ITC^DeltaCom, like all carriers, had been on notice since the rulemaking was initiated that it might be subject to compensation obligations during the first year of the interim period.[25] In fact, the *Report and Order* explicitly provided that small IXCs would have no duty to pay per-payphone compensation for the first year of the interim period (*i.e.*, November 7, 1996 through October 6, 1997).[26] Further, the rule requiring all IXCs to track individual compensable calls was not to become effective until one year after the effective date of the order.[27] The earliest conceivable notice to small IXCs that they might be required to begin tracking individual compensable calls was July 1, 1997, when the *Illinois* case was decided. A more reasonable date would be August 5, 1997, the public notice date establishing the pleading cycle for comments on the remand issues.[28] However, given that all of the IXCs were on notice that call tracking would not be required until after the first year of the interim period, and that there were only a few months remaining in the first year of the interim period it would be unreasonable to expect small IXCs to immediately establish a tracking mechanism. Moreover, as discussed in the *Petition* and below, under governing precedent, the legal effect of a court order vacating a rule is to reinstate the rules previously in force.[29] The prior rule imposed no such tracking requirement. Consequently, it was not unreasonable for ITC^DeltaCom to not track individual calls.

---

25 RBOC Coalition Comments at 2; Sprint Comments at 15.

26 *Report and Order*, 11 FCC Rcd at 20601 (¶119).

27 *Id.*; see also Rule 64.1310 Appendix E. Pursuant to the ordering clauses (¶ 366), the rules in Appendix E were not to become effective until one year after the effective date of the order.

28 *Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, 13 FCC Rcd 4801 (rel. Aug. 5, 1997).

29 *Petition* at 7.

D. Because the Rule was Vacated, the Commission Must Start the Rulemaking Process Anew.

Another critical distinction between the cases relied on by the Opposing Parties and this matter is the reviewing court's choice of remedy to "cure" the offending rule. In the cases cited by the Opposing Parties, the reviewing courts remanded the case back to the agency for further proceedings without vacating the defective rule. In stark contrast, the reviewing court here vacated certain parts of the payphone compensation plan, including the requirement that only those IXCs with annual toll revenues over $100 million pay compensation during the first year of the interim period.[30]

As one administrative law expert explained, when a court declines to vacate an agency rule it allows the agency on remand "to correct the inadequacy detected by the court without the often extremely disruptive effects of vacating the rule and requiring the agency to start the rulemaking process anew."[31] However, a judicial decision vacating an agency rule –

> often places an agency in a position in which it is powerless to enforce any rule governing an important area of activity during the period in which the now vacated rule purported to govern the area of activity and during the often lengthy period between the issuance of the judicial decision vacating the rule and the issuance of a new rule on remand that corrects the deficiencies the court detected in the statement of basis and purpose incorporated in the vacated rule.[32]

As explained in detail in the *Petition*, the legal significance of vacating the rule here was to set the rule aside.[33] However, as explained in the *Petition*, ITC^DeltaCom believes that the

---

30 *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 564-65, *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997) (clarifying that the rule at issue here was vacated).

31 *See* Richard J. Pierce, Jr., *Administrative Law Treatise*, § 7.4, p. 456-57 (4th ed. 2002).

32 *Id.* at 457.

33 *Petition* at 7.

disruptive effects of rule vacation will be minimized because the rule previously in force is reinstated.[34]

WorldCom makes the interesting, but factually wrong, argument that when the Commission adopted the transitional rule, which only required IXCs with toll revenues in excess of $100 million to pay, it also adopted a general rule requiring all IXCs to pay.[35] According to WorldCom, when the court vacated the transitional rule, the general rule requiring all IXCs to pay remained and became effective.[36] In fact, WorldCom has it backwards. The Commission first adopted the transitional rule, 64.1301(b), which only required IXCs with annual toll revenues in excess of $100 million to pay.[37] Rule 64.1300, the "general rule" WorldCom cites, was part of Appendix E (also known as the "deferred rules") of the Report and Order.[38] Pursuant to the ordering clauses, the rules in Appendix E became effective one year after publication of the text in the Federal Register.[39] The Commission intentionally provided a one-year notice period to give carriers sufficient time to ramp up. Concurrently, the Commission adopted a specific, limited-time interim compensation plan to be paid by the larger IXCs until the compensation by all regime became effective a year later. It was the rule adopting the specific, limited time plan (obligating only the large IXCs to pay) that was vacated. Because the general rule requiring all carriers to pay (Rule 64.1300) was not to become effective until one year later

---

34 *Petition* at 7. Prior to the payphone compensation proceedings, IXCs with annual toll revenues in excess of $100 million were required to compensate competitive payphone owners flat-rate compensation in the amount of $6 per phone per month.

35 WorldCom Opposition at 3.

36 *Id.* at 4.

37 *Report and Order*, 11 FCC Rcd at 20720 (Appendix D) (1996). Pursuant to the ordering clause, the transitional rules became effective 30 days after publication in the Federal Register. *Id.* at 20710 (¶ 365).

38 *Id.* at 20722 (1996).

39 *Id.* at 20710 (¶ 366).

(*i.e.*, after the first year of the interim period), it could not by its own terms replace the interim rule, nor did the court so order. Therefore, WorldCom's claim is wrong.

Because the Commission is barred from adopting a substitute rule for first year of the interim period, there does not appear to be any lawful compensation obligation that can be imposed for the first year of the interim period other than to spring the old rule into effect. However, if the Commission can do anything other than reinstate the rule previously in force, all that it can do is to correct the amount of overpayment by the IXCs with toll revenues over $100 million by reducing their payment obligations so they only pay for their own calls. ITC^DeltaCom is not certain that even this can be done in light of *Bowen*.

II. CONCLUSION

For the foregoing reasons, the Commission should deny the oppositions filed by AT&T, the RBOC Coalition, Sprint, and WorldCom and grant ITC^DeltaCom's request for reconsideration.

Respectfully submitted,
ITC^DELTACOM COMMUNICATIONS, INC.

By: 

Robert J. Aamoth
Steven A. Augustino
Randall W. Sifers
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600
Its Attorneys

Dated: May 13, 2002

CERTIFICATE OF SERVICE

I, Beatriz Viera-Zaloom, hereby certify that on this 13th day of May, 2002, copies of the attached Reply to Oppositions to Petition for Reconsideration filed on behalf of ITC^DeltaCom Communications, Inc. in CC Docket No. 96-128 were served by hand or by first-class mail on the following:

Dorothy Attwood, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Tamara Preiss, Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Lynne Milne
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon
Legal Advisor to Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Matthew Brill
Legal Advisor to Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel Gonzalez
Sr. Legal Advisor to Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Sr. Legal Advisor to Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mark C. Rosenblum
Stephen C. Garavito
Teresa Marrero
AT&T Corporation
295 North Maple Avenue
Basking Ridge, NJ 07920

Michael K. Kellogg
Aaron M. Panner
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036
Attorneys for RBOC Payphone Coalition

John E. Benedict
H. Richard Juhnke
Sprint Corporation
401 Ninth Street, NW, Suite 400
Washington, DC 20004

Larry Fenster
WorldCom, Inc.
1133 19th Street, NW
Washington, DC 20036

Qualex International
445 12th Street, S.W.
Room CY-A257
Washington, D.C. 20554

B. Viera-Zaloom

Beatriz Viera-Zaloom